(3)

No. 83-2132

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

LUCKY STORES, INC.
Petitioner,

v.

JOHN GARIBALDI,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION

CHARLES G. BAKALY, JR.,
400 South Hope Street
15th Floor,
Los Angeles, Calif. 90071-2899,
Counsel for Petitioner

Of Counsel:

O'MELVENY & MYERS,
GORDON E. KRISCHER,
JOEL M. GROSSMAN,
VICTORIA D. STRATMAN

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PRELIMINARY STATEMENT

In his Opposition Brief, Respondent does not in any way respond to Petitioner's central argument, that the rule of finality of labor arbitration awards, established by this Court more than twenty years ago in *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) (*"Steelworkers Triology"*) bars a subsequent court action for wrongful discharge. Rather, Respondent focuses on the issues of removal and preemption, contending that they were correctly decided by the Ninth Circuit, and that the instant Petition should therefore be dismissed.

As will be seen, however, removal in this case was clearly proper under the "artful pleading" doctrine, as Respondent's complaint was in essence a Section 301 allegation that he was discharged in violation of the collective bargaining agreement between Petitioner and his union. Moreover, the court action is clearly barred by the strong federal labor law policy of finality of arbitration awards.

ARGUMENT IN REPLY

1. Respondent's Action Was Properly Removed Under The "Artful Pleading" Doctrine, and Is Preempted By Federal Labor Law

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301") confers original jurisdiction upon the federal district courts over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . ." The courts have consistently held that under this statute, an individual employee's complaint which alleges wrongful discharge in breach of a collective bargaining agreement is removable under 28 U.S.C. § 1441 ("Section 1441") on the basis of the jurisdictional grant of § 301, regardless of whether a specific reference to § 301 is made in the complaint. *See e.g., Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers,* 390 U.S. 557 (1968); *Fristoe v. Reynolds Metals Company,* 615 F.2d 1209, 1212-13 (9th Cir. 1980). The Ninth Circuit has very recently reaffirmed this principle in *Buscemi v. McDonnell Douglas Corp., et al,* — F.2d — (9th Cir. slip op. July 6, 1984).

While Respondent's complaint attempted to defeat federal jurisdiction by omitting reference to § 301 or the collective bargaining agreement, under the artful pleading rule federal courts look beyond the language of the com-

plaint to determine the true nature of the complaint. *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1980); *Schroeder v. Trans World Airlines, Inc.,* 702 F. 2d 189, 191 (9th Cir. 1983). In *Moitie,* this Court quoted with approval the following language from a leading treatise:

> "[courts] will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of Plaintiff's characterization." 452 U.S. at 397, n.4

Just as the action was properly removed if it is in reality an action for breach of the collective bargaining agreement, so too, as set forth at length in the Petition, under established principles of federal labor law the action is barred by the rule of finality of arbitration awards. (Petition at 9-15.) As this Court has stated on numerous occasions:

> "When an employee's claim is based upon breach of the collective bargaining agreement, he is bound by the terms of that agreement which govern the manner in which contractural rights may be enforced. *Only* if the arbitration process has been tainted, *e.g.*, by the union's breach of its duty of fair representation, may the employee pursue his grievance in the courts." *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 730 n. 10, (1981), *quoting, Vaca v. Sipes,* 386 U.S. 171, 184 (1967). (Emphasis added.)

Respondent has not at any time alleged that his union failed to represent him fairly.

There can be little doubt that the instant complaint alleges a breach of the collective bargaining agreement. In Paragraph 6 of the complaint, which is attached hereto as Appendix A, Respondent alleges that "by reason of the

aforesaid *contract of employment* . . . defendant became obligated to deal fairly and in good faith with plaintiff." (Emphasis added.) In Paragraph 8, Respondent alleges that his termination by Lucky was wrongful in that "defendant terminated plaintiff without first affording plaintiff a review of his suspension *as required by the policy and agreements of said defendant employer*." Because Respondent does not allege the existence of, or the terms of any individual contract or agreement with Petitioner, the only "contract of employment" or "policy and agreements" to which Respondent could have been referring in his complaint is the collective bargaining agreement.

Respondent has already claimed, in the grievance and subsequent arbitration, that the very conduct alleged in the instant complaint constituted a breach of the collective bargaining agreement. Indeed, that was the entire basis of the grievance and arbitration. Respondent now claims that in point of fact his claim of retaliatory discharge does *not* set forth a claim for breach of the collective bargaining agreement.* Such artful dodging is unpersuasive. The claim is clearly one for breach of the collective bargaining agreement. It was properly removed, and it is barred under the finality rule.

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*Respondent attempts to explain this inconsistency by stating that he filed the grievance and took the case to arbitration in order to exhaust his administrative remedies. (Opposition Brief at 4, 7.) This argument is curious. There is no duty to exhaust administrative remedies which do not exist; thus if the conduct alleged did not violate the collective bargaining agreement, then Respondent would have had no remedy to exhaust. For example, an employee bringing an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* has no duty to exhaust his administrative remedy before filing suit. *See, Gibson v. Longshoremen, Local 40*, 543 F. 2d 1259, 1266 n. 14 (9th Cir. 1976). If Respondent had a duty to exhaust the administrative remedy, which he has now conceded, then his claim was clearly for breach of the collective bargaining agreement and he was bound by the arbitrator's decision.

2. Respondent's Reliance on This Court's Decisions in New York Telephone, Farmer v. Carpenters and Vaca v. Sipes is Misplaced

Respondent mistakenly relies on several of this Court's decisions which have no applicability to the instant case. Respondent contends that *New York Telephone Company v. New York State Department of Labor*, 440 U.S. 519 (1979) and *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977) "dictate the proper analysis to be employed" in this case. *New York Telephone*, however, involved a question of whether the Labor Management Relations Act prohibited the State of New York from paying unemployment compensation to strikers. 440 U.S. at 522. The case did not concern either the finality of arbitration awards or a subject matter that is covered by collective bargaining agreements, but rather the relationship between state and federal legislative schemes.

In *Farmer*, the Court held that Section 301 did not preempt a state action by a union member against his union for intentional infliction of emotional distress. However, the Court held that the action was not preempted because it related to the "manner" of the union's discrimination against him, "rather than ... the actual or threatened discrimination itself." 430 U.S. at 305. In the instant case, Respondent's first cause of action — for wrongful discharge — is based on the *fact* that he was discharged, not the manner in which the discharge was accomplished. Respondent's complaint set forth a separate and independent second cause of action against Petitioner for infliction of emotional distress, and *that* cause of action was remanded to the State Court. See Petition at B-1. Thus, the only cause of action before the Court now is the action for wrongful discharge, and that action relates only to the fact of the discharge. *Farmer* is therefore inapposite. Additionally, like *New York Telephone, Farmer* does not concern the finality of labor arbitration awards.

Respondent alleges that his claim falls within the *Farmer* holding because he has set forth a claim based not on rights given under the collective bargaining agreement, but on "rights given under state common law..." Respondent fundamentally misstates California wrongful discharge law. In California, where courts have created a cause of action for wrongful discharge for *at-will employees* when their termination contravenes public policy, there are no cases allowing such a cause of action for union-represented employees working under a collective bargaining agreement. In *Petermann v. International Brotherhood of Teamsters,* 174 Cal. App. 2d 184, 344 P.2d 25 (1959), the landmark case creating a public policy exception to the employment at-will rule, the California Court of Appeal held that an at-will employee could not be terminated for refusing to commit perjury. The court explained that the employee could not be placed in the dilemma of choosing between his job and obeying the law. In the court's words:

> "To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of the employer would be to encourage criminal conduct.... This is patently contrary to public welfare." 174 Cal. App. 2d at 189.

Petermann was followed by the California Supreme Court in *Tameny v. Atlantic Richfield Co.,* 27 Cal. 3d 167, 164 Cal. Rptr. 839 (1980) which also was addressed to the rights of non-union at-will employees.

The rationale of these cases is clearly inapplicable in the case of a union-represented employee protected by a collective bargaining agreement which requires good cause for discharge. Such an employee is already protected from arbitrary or retaliatory discharge — such as discharge for failure to violate the law — because such a discharge would not be for "just cause." Thus, the wrongful discharge "public policy" cases have no application to employees such as Respondent.

Finally, Respondent has mischaracterized this Court's decision in *Vaca v. Sipes,* 386 U.S. 171 (1967). Respondent quotes out of context the statement in *Vaca* that contractual remedies available to the union employee "may well prove unsatisfactory or unworkable for the individual grievant." 386 U.S. at 185. The Court did not, of course, go on to say that an employee could bring a tort action to recover punitive damages, because the contractual remedies were inadequate. Rather, the Court explained that in two limited circumstances the employee will not be bound by the contractual grievance procedure: (1) where the employer repudiates the contract; or (2) where the union fails to represent the employee fairly. Neither situation is present in the instant case, and *Vaca* is of no help to Respondent.

3. The Decision Below is in Conflict with the Seventh Circuit's Decision in Lamb

Respondent also asserts that there is no conflict between the decision below and the Seventh Circuit's decision in *Lamb v. Briggs Manufacturing, a Division of the Celotex Corp.*, 700 F.2d 1092 (7th Cir. 1983). This is simply incorrect. *Lamb's* holding — that under the *Steelworkers Trilogy* an arbitration award bars a subsequent state law tort action for retaliatory discharge in violation of public policy — surely creates a conflict with the decision below.

Respondent weakly argues that the *Lamb* decision is tied to the "unique nature of the wrongful discharge action permitted under Illinois law." (Opposition Brief at 11.) However, California and Illinois both permit a tort action for discharge of at-will employees in violation of public policy. More importantly, the *Lamb* court relied on this Court's decisions in the *Steelworkers Trilogy* in holding that the prior arbitration award barred a subsequent court action raising the same allegations. The decision was thus tied to principles of federal labor law, not the "unique nature" of Illinois law.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

CHARLES G. BAKALY, JR.
Counsel for Petitioner

Of Counsel:

O'MELVENY & MYERS
GORDON E. KRISCHER,
JOEL M. GROSSMAN
VICTORIA D. STRATMAN

August 21, 1984

APPENDIX A

David W. Graf, a law corporation. Fred J. Knez, Banks, Leviton, Kelley, Drass and Kelsey, Inc. 1600 N. Broadway 10th Floor, Santa Ana, CA 92706. (714) 835-1404. Attorneys for Plaintiff.

Superior Court of the State of California for the County of Orange.

John Garibaldi, Plaintiff, v. Lucky Stores Inc., and DOES 1 through XXX, inclusive, Defendants. Case No. 36-45-74. Complaint for damages for bad faith, wrongful termination of employment and intentional infliction of emotional distress.

FIRST CAUSE OF ACTION

1. The true names and capacities of all defendants DOE are unknown to plaintiff, who sues them by such fictitious names under §474 of the California Code of Civil Procedure. Each defendant DOE wrongfully caused plaintiff injury and damage.

2. Plaintiff is informed and believes, and upon such information and belief alleges that defendants, and each of them, were the agents, employees, servants, joint venturers, and/or co-conspirators of the remaining defendants, and were acting within the course and scope of said agency, employment joint venturer or conspiracy; that defendants, and each of them, when doing the things alleged herein, were the actual or obstensible (sic) agents of the remaining defendants and were acting within the course and scope of said agency; and that each and every defendant, as aforesaid, when acting as a principal, was negligent in the selection, hiring, supervision and continued employment of each and every other defendant as an agent, employee or joint venturer; and/or that said defendants approved, supported, participated in, authorized and/or ratified the

acts and/or omissions of said employees, agents, servants, conspirators and joint venturers.

3. Plaintiff is informed and believes, and upon such information and belief alleges that defendant LUCKY STORES INC. is a corporation organized and existing under and by virtue of the laws of one of the United States and authorized to do and doing business within the State of California; plaintiff is not informed as to the true capacity of all defendant DOES and will ask leave of court to amend this complaint when the same is ascertained.

4. On or about October 1969 plaintiff became employed for defendant LUCKY STORES INC. as a box-boy; thereafter, plaintiff was promoted to a clerking position in 1970 and then, that year, took a three (3) year leave of absence for military service; in 1973 plaintiff was honorably discharged from the military and, returned to his employment with said defendant, as a journeyman in grocery clerking and cashiering; thereafter, in April 1977, plaintiff was transferred to truck driving for said defendant and continued his employment with said defendant until his termination on October 23, 1980.

5. Plaintiff satisfactorily performed his employment duties for said defendant; sought a career with said defendant; and reasonably relied on his longevity of employment for job security.

6. By reason of the aforesaid contract of employment and/or employment relationship, and the nature and extent thereof, said defendant became obligated to deal fairly and in good faith with plaintiff.

7. On or about March 27, 1979, plaintiff discovered that he had a bad load of milk and plaintiff reported this to his supervisors; defendant supposedly checked the milk load and found it to be "okay"; defendant directed plaintiff to

deliver said load of milk to defendant's Glendale grocery store: plaintiff contacted the Health Department and a Health Department inspector met plaintiff at the aforesaid store of defendant and condemned all fluid milk in the load.

8. On or about October 3, 1980, defendant suspended plaintiff, and thereafter, on October 23, 1980, defendant terminated plaintiff without first according plaintiff a review of said suspension as required by the policy and agreements of said defendant employer.

9. The termination of plaintiff was wrongful and offensive to the implied covenant of good faith and fair dealing that existed between plaintiff and defendant LUCKY STORES INC.; defendants, and each of them, did not act in good faith and did not deal fairly with plaintiff, but, on the contrary, embarked upon a campaign of harrassment and retaliation against plaintiff and wrongfully, unfairly, unreasonably and in bad faith suspended and terminated the plaintiff for reasons that offend public policy.

10. The conduct of defendants, and each of them, in doing the things alleged herein, was oppressive, malicious and outrageous and was done with a conscious and reckless disregard for plaintiff's rights, sensibilities and financial welfare; for the purpose of retaliating against plaintiff, and was done with the intent to coerce, vex, injure, harrass and annoy plaintiff; and thereby, plaintiff is entitled to exemplary damages in the sum of $1,000,000.

11. As a direct and proximate result of the bad faith and wrongful conduct of defendants, and each of them, as alleged herein, plaintiff has sustained special damages and economic losses, including employment benefits, lost wages, medical and hospital expenses and other incidental expenses; and plaintiff has sustained general damages for emotional and mental distress, anguish, anxiety, embarrassment, and humilation.

SECOND CAUSE OF ACTION

12. Plaintiff refers to paragraphs 1 through 8 and 10 and 11 of his First Cause of Action and by such references, incorporates them herein, the same as though set forth in full.

13. When plaintiff reported the bad load of milk to the Health Department and said Health Department inspector condemned the load, defendants, and each of them, embarked upon a campaign of harrassment in retaliation against plaintiff; and as a result of said conduct of defendants, and each of them, plaintiff was caused to suffer physical, emotional and financial distress, anxiety, anguish, embarrassment and humiliation.

14. The conduct of defendants, and each of them, as aforesaid was done with the knowledge that plaintiff's emotional and physical stress would thereby increase, and was done with a wanton and reckless and conscious disregard for the consequences to plaintiff. Said defendants, and each of them, by such conduct, as aforesaid, acted with the knowledge and specific motive, intent, purpose and reason of attempting to coerce, vex, harrass, annoy, injure and deprive plaintiff; and such acts were thereby done with malice, oppression, and malicious intent toward plaintiff, and/or with a conscious disregard for plaintiff's rights and sensibilities; and therefore, plaintiff is entitled to exemplary damages in the sum of $1,000,000.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;
2. For all special damages alleged and proved;
3. For punitive damages in the sum of $1,000,000;
4. For cost of suit incurred herein, and;

5. For such other and further relief as the court may deem just and proper.

DATED: October 2, 1981

BANKS, LEVITON, KELLEY,
DRASS AND KELSEY, INC.
By FRED J. KNEZ
Attorney for Plaintiff